No. 11,513

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PERCY JAMES CUTTING,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

WARREN A. TAYLOR,
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Table of Authorities Cited

Cases

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The plaintiff in error, Percy James Cutting, was convicted in the United States District Court for the Territory of Alaska, Fourth Division, of the crime of petit larceny, on an indictment which is as follows:

"In the District Court for the Territory of Alaska
Fourth Judicial Division

No. 1268 Cr.

United States of America
vs.
Percy James Cutting

INDICTMENT

COUNT I.

Percy James Cutting is accused in Count I of this indictment by the Grand Jury for the Territory of

Alaska, Fourth Judicial Division, of the crime of Grand Larceny committed as follows, to-wit:

That the said Percy James Cutting, on or about the 22nd day of October, 1945, in the Fourth Division, Territory of Alaska, then and there being, did then and there wilfully, unlawfully and feloniously take, steal and carry away one (1) Westinghouse electric range, type TH64, Serial No. 830175, frame style No. 1086298, of the value of more than Thirty-five Dollars ($35.00), the personal property of the United States of America, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

COUNT II.

Percy James Cutting is accused in Count II of this indictment by the Grand Jury for the Territory of Alaska, Fourth Judicial Division, of the crime of Grand Larceny committed as follows, to-wit:

That the said Percy James Cutting, on or about the 24th day of October, 1945, in the Fourth Division, Territory of Alaska, then and there being, did then and there wilfully, unlawfully and feloniously take, steal and carry away one (1) Westinghouse refrigerator, further identified by a refrigeration unit name plate showing model JX-5, style 9630150, Serial No. 4218652, of the value of more than Thirty-five Dollars ($35.00), the personal property of the United States of America, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

Dated at Fairbanks, Alaska, this 23rd day of February, 1946.

Harry O. Arend,
United States Attorney.

Witnesses before the Grand Jury:

Andrew Jackson Hall	Virginia Houston
Thomas E. Murton	Erling Nestland
Bernard J. Zobel	James M. Jorgensen
Joseph L. Lymp	Mrs. Ben Grueneich
Charles V. Cors	Leo Hardy
Mrs. D. E. Nichols	Harold Byrd

Stanley D. Baskin"

During the trial of plaintiff's case in chief, Count II of the Indictment was dismissed.

The appellant was sentenced by the Honorable Harry E. Pratt, Judge of the District Court, to serve a term of one (1) year in the federal jail at Fairbanks, Alaska.

The errors assigned are as follows:

1. That the Court erred in overruling defendant's motion to dismiss Counts I and II in the Indictment for the reason that the allegations therein contained do not constitute a cause of action against the defendant.

2. That the Court erred in admitting in evidence Plaintiff's Exhibit A over defendant's objection.

3. That the Court erred in overruling defendant's motion for direct verdict of "not guilty" made at the conclusion of plaintiff's case in chief upon the grounds

that there had been no evidence of ownership of the range in question, and also upon the grounds that the testimony offered by the plaintiff has shown that the defendant was lawfully in possession of the said range. (Pl. Ex. E.)

4. The Court erred in overruling defendant's objection to the admission of Plaintiff's Exhibit E (electric range) in evidence.

5. That the Court erred in admitting in evidence Plaintiff's Exhibit A, unsigned memorandum receipt.

6. That the verdict is contrary to the evidence:

(a) That there is no evidence that the Plaintiff's Exhibit E was property of the United States Government.

(b) That there is no evidence of the taking by the defendant except that of accomplices whose testimony was uncorroborated and whose testimony should be viewed with suspicion.

(c) Testimony of Audrey Cutting and Sylvia Henderson regarding purchase of range, Plaintiff's Exhibit E, and Defendant's Exhibits 2 and 3 bearing signature of M. W. O'Neil.

7. The Court erred in admitting in evidence Plaintiff's Exhibit 2 upon the grounds that the constitutional rights of the defendant have been violated by the taking of the exhibit by officers of the Federal Bureau of Investigation without a search warrant.

8. That the Court erred in overruling defendant's motion for a new trial.

9. That the Court erred in rendering and entering judgment and commitment against said defendant, Percy James Cutting.

There are several assignments of error shown by the record herein, but appellant chiefly relies upon and urges, what is considered to be the three chief errors, to-wit: the insufficiency of the evidence to support the verdict; the improper admission of evidence and certain exhibits and the manner in which the evidence was acquired by an agency of the Government. Upon the insufficiency of the evidence, as to the direct identification of the property and as to the real ownership of the property, we state, as a matter of law, that it is incumbent upon the Government, the plaintiff in this case, to establish beyond a reasonable doubt its ownership of the property charged in the indictment to have been the subject of larceny by the accused. Citing *Fosse v. United States of America,* 44 F. (2d) 915, and *Karn v. United States of America,* 158 F. (2d) 168.

Quoting from the language in the opinion of *Karn v. United States of America, supra,* the Court stated:

> "The prosecution relied entirely upon circumstantial evidence for a conviction. It is sufficient to say that under such circumstances, the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. The evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt. 23 C.J.S. 151, 152, § 907, Criminal Law; *Paddock v. U. S.* (1935), 79 F. 2d 872,

876, 9-CCA; *Ferris v. U. S.* (1930), 40 F. 2d 837, 840, 9-CCA."

We submit that the same rule applies in the case at bar.

Careful reading of the transcript of the testimony herein will show that at no time was the direct ownership of the property *at the time of the accused of having taken the same,* was the property of the Government. In fact, upon the reading of the transcript, it is shown that the property came into the possession of appellant from a third party, who executed a bill of sale, representing himself to be the true owner of said property.

Upon the question of the failure of the Court to exclude the evidence on defendant's motion, as it was acquired under an illegal search, being taken from the dwelling of defendant; for a definition of a dwelling, as applicable to the case at bar, we quote two sections from *Voorhees on Arrest,* Sections 169 and 170, at pages 96 and 97, as follows:

"§169. Combined Residence and Place of Business.—Where the front of a building is occupied by the owner as a shoe-shop, and is connected with the rear and overhead portion, which is used as a dwelling, the building is a dwelling-house.

"Rex v. Turner, 1 Leach (Eng. C. C.), 305.
Stedman v. Crane, 11 Metc. (Mass.) 295.
Barnes v. Peters, L. R. 4 C. P. 539.
People v. Cowteral, 18 Johns. (N. Y.) 115.
Davis v. State, 38 Ohio St. 506.
Pond v. People, 8 Mich. 150.
People v. Dupree, 98 Mich. 26.

"And where a woman occupied as her dwelling a building containing a single room, in which she also carried on her trade as a milliner, and kept therein a stock of millinery goods, it was held that the use of the room as a place of business did not change its character as a dwelling, and that breaking the door in the execution of civil process was illegal."

"§170. Use of House Must Be Primarily and Habitually for Sleeping Purposes.—The house must be used as the usual and habitual place for sleeping purposes, by the owner or some member of his family, or his servants, in order to make it a dwelling-house.

"A storehouse of the owner, who resides nearby, and in which he *occasionally* slept, is not a dwelling-house. But if a part of a storehouse, communicating with the part used for store purposes, is slept in *habitually* by the owner or some member of his family, although he sleeps there for the purpose of protecting the premises, it is his dwelling-house. If, however, the person who sleeps there is not the owner, or one of his family, or a servant, or clerk, but is employed to sleep there solely for the purpose of protecting the premises, the store is not a dwelling-house. (Italics ours.)

"Welsh v. Wilson, 34 Minn. 92.
State v. Jenkins, 5 Jones (N. C.), 430.
State v. Potts, 75 N. C. 129.
State v. Williams, 90 N. C. 724."

The Court erred in refusing defendant's motion for a judgment of acquittal. James Wise, a witness called in behalf of the plaintiff, whose testimony appears in

the transcript of the record at pages 35 to 41, and who was at that time the resident engineer at Satellite Field, testified that the property described in the indictment was rightfully and lawfully in the possession of the defendant. Therefore, if the property was rightfully in defendant's possession, as it was, according to the testimony of the said resident engineer, it could not be the subject of larceny.

The Court erred in admitting into evidence a certain alleged memorandum receipt, as the same was not properly identified. Federal Digest, Volume 6, Criminal Law, Key 444, page 5847:

> "(U.S.C.C.A. Mo. 1922) In a prosecution for larceny from a railroad car and having in possession the alleged stolen property, papers of the consignor, identified by one in charge of its shipping department as made in the regular course of business under his general supervision, who did not see the work done, nor the entries made, were erroneously admitted in evidence, where the absence of the employee who made the records and who did the work recorded on the sheets was unexplained, except by a statement of counsel that he could not be found.—Reineke v. U. S., 278 F. 724.
>
> "In prosecution for larceny from railroad car and possession of stolen property, where agent of railroad was called as witness and shown a certain paper which he said was the original bill of lading issued to the consignor for the contents of the car, from which property was claimed to have been stolen, such bill of lading was erroneously offered in evidence without further identification.—Id."

For the reasons stated above, appellant respectfully prays that the verdict and commitment be reversed and remanded.

Dated, Fairbanks, Alaska,
July 12, 1948.

Respectfully submitted,
WARREN A. TAYLOR,
Attorney for Appellant.